INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The Board's conclusion and order	5
C. The decision of the court of appeals	7
Argument	7
Conclusion	11

CITATIONS

Cases:

Montana-Dakota Utilities Co. v. *National Labor Relations Board*, 455 F.2d 1088	10
National Labor Relations Board v. *Rockaway News Supply Co.*, 345 U.S. 71	10
News Union of Baltimore v. *National Labor Relations Board*, 393 F.2d 673	10
Transportation-Communication and Employees Union v. *Union Pacific R. Co.*, 385 U.S. 157	9
United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574	9

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	
Section 8(a)(1)	5, 7

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1630

KELLOGG COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-37) is reported at 457 F. 2d 519. The decision and order of the National Labor Relations Board (Pet. App. 37-70) are reported at 189 NLRB No. 123.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1972 (Pet. App. 21). The petition for

a writ of certiorari was filed on June 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the collective bargaining agreement entered into between the union and the company did not waive the right of employees covered by the agreement to decline to cross a picket line set up at their plant by fellow employees represented by another union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 3-5 of the petition.

STATEMENT

A. The Board's Findings of Fact

The Company employs approximately 3500 unionized employees at its Battle Creek, Michigan plant; about 3350 belong to Local 3 of the American Federation of Grain Millers ("Local 3"), and the remaining 150 belong to Local 480 of the Printing Specialty and Paper Products Union ("the Pressmen") (A. 147; 111).[1] The contracts of both unions

[1] "A." refers to the appendix to the briefs in the court below.

expired in April 1969. On April 26 the Company and Local 3 signed a new contract which was made retroactive to April 15 (A. 147; 109-112). The contract contained the following pertinent provisions affecting the right of Local 3 and its members to cause or engage in work stoppages (Pet. App. 38, n. 2):

> NO STRIKES—NO LOCKOUTS
>
> Section 1101
>
> (a) During the life of this Supplemental Agreement no strike or work stoppages in connection with disputes arising hereunder shall be caused or sanctioned by the Union, or by any member thereof, and no lockout shall be ordered by the Company in connection with such disputes.
>
> NO SYMPATHY STRIKE
>
> Section 1102
>
> During the life of this Supplemental Agreement, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences between the AFL-CIO or any of its affiliated Unions involving other plants of the Company.
>
> STRIKE AUTHORIZATION
>
> Section 1103
>
> It is agreed that before a strike may be called the Company will be given a copy of

> the written authorization which is provided to the local Union by the President of the AMERICAN FEDERATION OF GRAIN MILLERS authorizing such action to be taken in accordance with its Constitution and By-laws.

Contract negotiations between the Company and the Pressmen were not successful, and on April 25 the Pressmen struck and established a picket line at the plant (Pet. App. 53). In consequence, several members of Local 3 refused to report to work for the 6:00 p.m. shift. These included Elaine Putnam, the wife of a striking pressman, and Robert Sutfin, whose father was on strike. When Putnam and Sutfin continued to refuse to cross the Pressmen's picket line, they were discharged (Pet. App. 56-60).

On April 30, a few days after the Pressmen staged their strike, the following telegram from President Wilburn of the International Union of Grain Millers was posted on Local 3's bulletin boards in the plant and was broadcast on a local radio station (A. 151-152; 67, 114):

> A small number of members of Local 3 are violating their own contract by refusing to report to work. Please advise these members that they are in violation of a valid contract with the Kellogg Company which has been approved by the membership of Local 3 and the International Union, and further instruct these members that in order to protect their jobs they must report to work immediately.

The Company also attempted to make contact with absent Local 3 members and urged them to return

to work (A. 151-152; 117). The officers of Local 3, however, while they arranged for the posting and broadcast of Wilburn's telegram, did not officially instruct Local 3 members that they had a contractual obligation to cross the Pressmen's picket line.[2] Indeed, Local 3 filed grievances concerning the discharges of Sutfin and Putnam, taking the position that they had been engaged in protected activity which was not waived by the contract. Local 3 also filed charges with the Board on the same theory (Pet. App. 40).

B. The Board's Conclusion and Order

On the foregoing facts, the Board (with one member dissenting) concluded that the Company violated Section 8(a)(1) of the Act by discharging employees Putnam and Sutfin because they had engaged in the protected activity of refusing to cross a picket line (Pet. App. 37-51). The Board rejected the Company's contention that, in the new bargaining agreement, Local 3 had surrendered its members' right to

---

[2] On April 25, the day before the contract here at issue was entered into, the president of Local 3 issued a statement advising the Union members that they were required to honor the provisions of the old contract which had been extended and which prohibited them from honoring the picket line (A. 64-67). The contract here at issue was entered into on April 26, and contained a significantly different clause. Although the old contract provided that "no strikes or work stoppages shall be caused or sanctioned by the Union, or any members thereof" (A. 77), the new contract prohibited only strikes and work stoppages "in connection with disputes arising" under the contract (Pet. 5).

honor a picket line set up by fellow employees at the Battle Creek plant. The Board found that the provisions in question were "unambiguous" in establishing that "the Union [had] waived for itself and its members the right to strike over a dispute arising under the terms of the contract, but [had] not * * * waived the right of its members to refuse to cross a picket line in sympathy with another union's strike" (Pet. App. 40). The Board further found that the April 30 telegram from International Union President Wilburn did not impair this conclusion, for it was outweighed by the clear language of the contract itself, and the other evidence in the record which showed that the parties "intended and understood that the no-strike clauses constituted merely a narrow prohibition on strike activity" (Pet. App. 40).[3] The Board ordered the Company, *inter alia*,

---

[3] The Board further stated (Pet. App. 40-41):

> In this regard we note that the Charging Party at every step of the grievance procedure concerning the two discharges took the position that the employees were engaged in concerted protected activity which was not waived by the contract, and also filed charges with the Board on the same theory. More importantly, Respondent during these proceedings said that in firing these employees it was not charging a breach of any of the no-strike prohibitions but rather a violation of its work rule concerning unsatisfactory attendance. In addition, we find of critical importance in evaluating evidence of the parties' intent the total absence of any contemporaneous evidence of the bargaining history in regard to the negotiation of the various no-strike clauses which would indicate that the parties intended the no-strike commitment to be a broad one. Moreover, it appears that Respondent itself viewed the section 1101 no-strike prohibition as constituting a

to reinstate employees Sutfin and Putnam with backpay (Pet. App. 45-46).

C. The Decision of the Court of Appeals

The court of appeals enforced the Board's order. Applying the principle that a union, when it relinquishes a statutory right belonging to it or the employees it represents, must do so in "clear and unmistakable" language (Pet. App. 32), the court found that there was "nothing in the language of [the parties'] contract which prohibits a member of the Millers Union at the Battle Creek Plant from honoring the picket line of another union at the same plant" (Pet. App. 35). Under these circumstances the court of appeals found it unnecessary to consider extrinsic evidence in construing the contract. The court of appeals concluded by holding that "the employees in question were engaged in protected concerted activity" when they refused to cross the Pressmen's picket line, and that thus their discharge for engaging in that activity violated Section 8(a)(1) of the Act (*ibid.*).

ARGUMENT

1. The court of appeals properly held that the right of the employees to strike could be waived only

---

narrow ban on strike activity relating only to disputes cognizable under the contract, as it unsuccessfully attempted after the two discharges to obtain an agreement from the Charging Party to modify this clause to eliminate the phrase "in connection with disputes arising hereunder,"—a phrase which significantly restricted the scope of the no-strike clause in the previous agreement * * *.

by "clear and unmistakable" language. The contract, far from waiving the right to engage in a sympathy strike of the kind present here, excludes such strikes from the "no-strike clause". As the Board held (Pet. App. 39), this provision (Section 1101) of the contract prohibits only work stoppages caused or sanctioned by the Union or any of its members "in connection with disputes arising [under this Agreement]," and is "not applicable to a situation where, as here, individual employees refuse to cross another union's picket line at the Employer's own plant." The Board's interpretation is confirmed by the presence of a separate provision dealing with sympathy strikes. But, while Section 1102 of the contract does relate to such strikes, it too is inapplicable to the situation here. As the Board stated (Pet. App. 40):

> That section specifically forbids the Union to engage in a sympathy strike as a result of union differences with "any *other* local or national employers" [emphasis supplied]. It is clear therefore that a sympathy strike, as in the instant case, at the Company's local plant is not prohibited by that section. Moreover, unlike section 1101, the prohibition against striking extends only to "the Union." The critical phrase "or any other member thereof," which was included in section 1101, was omitted from section 1102. * * *[4]

---

[4] The Court of Appeals relied upon the second ground stated by the Board in enforcing the order. The court held (Pet. App. 35, emphasis in original):

> By its terms the contract prohibits *any member of the* Union from striking because of a dispute under the con-

In these circumstances, the Board correctly concluded that Local 3 had not "waived the right of its members to refuse to cross a picket line in sympathy with another union's strike" (Pet. App. 40). Accordingly, there was no need to resort to extrinsic evidence to determine the intention of the parties. In any event, the Board stated that it had considered "all the pertinent evidence in this case" (Pet. App. 42), including the extrinsic evidence upon which petitioner relies (Pet. 7-8), and concluded that such evidence failed to indicate "a waiver of the right of these individual employees to cross the picket line" (Pet. App. 42; see also, *supra*, pp. 6-7, n.3).

2. Petitioner suggests that the court of appeals improperly refused to consider "extrinsic evidence" in reviewing the Board's construction of the contract. The decisions of this Court upon which petitioner relies (Pet. 11), however, merely contain restatements of the general principle that "gaps" in collective bargaining agreements may be filled by reference to "other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Transportation-Communication and Employees Union* v. *Union Pacific R. Co.*, 385 U.S. 157, 160-161; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-581. The instant case, unlike those

---

tract. The sympathy strike clause relates only to sympathy strikes caused or sanctioned by the Union and makes no reference to the right of the members to refrain from crossing a picket line.

petitioner cites, involves the issue whether extrinsic evidence—such as the statement by an officer not of the local union but of the international union—is significant in construing an agreement which does not, as the cases require, indicate an express purpose by the employees to waive their statutory right to strike.

The two court of appeals decisions, upon which petitioner relies and which do involve similar problems, turn on their peculiar facts and are not in conflict with decision of the court of appeals here. Both cases involved "no-strike" provisions different from those present here, and the "extrinsic evidence" consisted of negotiations in which the Union had unsuccessfully attempted to obtain exemptions for sympathy strikes from "no-strike" clauses or expressly to limit the employer's right to discipline employees who participated in such strikes. *News Union of Baltimore* v. *National Labor Relations Board*, 393 F. 2d 673 (C.A.D.C.); *Montana-Dakota Utilities Co.* v. *National Labor Relations Board*, 455 F. 2d 1088 (C.A. 8); see also, *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80. Only in the first case did the court of appeals indicate that the Board could properly consider the statements made by local union officials who participated in the drafting of the argument. As earlier noted (*supra*, p. 9), the Board here did consider the less probative "extrinsic evidence" upon which petitioner relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

PAUL J. SPIELBERG,
Attorney,
National Labor Relations Board.

JULY 1972.

U. S. GOVERNMENT PRINTING OFFICE: 1972 471910 25